United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,425

JAMES L. TYLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

377

On Appeal from a Judgment
of the
United States District Court
for the
District of Columbia

May 9, 1967

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STATEMENT OF QUESTIONS PRESENTED

The questions are, in a trial upon an indictment for assault with a dangerous weapon and carrying a dangerous weapon:

1. Whether the Court abused its discretion in permitting the Government, over objection of defense counsel, to elicit from defendant, testimony that he had been convicted eleven years earlier for unauthorized use of a vehicle.

2. Whether the search of a parked automobile not incident to but preceding an arrest and made for the purpose of obtaining evidence for that arrest is authorized by law and whether the evidence resulting from the seizure should have been admitted at the trial.

3. Whether on the state of the record here, where the evidence was contradictory and no attempt was made to trace the ownership of the weapon, to determine whether there were fingerprints, and to show the circumstances as to the search, and whether the blood on the complainant was caused by blows struck by the defendant, the defense should have been put to its proof and the case submitted to the jury.

4. Whether it was error for the trial court to permit during rebuttal, the introduction of testimony, purely cumulative in nature, when the defense witnesses had denied the Government testimony on this point in the case in chief.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES L. TYLER, :

Appellant, :

v. : No. 20,425

UNITED STATES OF AMERICA, :

Appellee. :

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted, tried and convicted in the United States District Court for the District of Columbia on a count of assault with a dangerous weapon, 22 D.C. Code § 502 (1961 Ed.) and on a count of carrying a dangerous weapon without a license therefor 22 D.C. Code §3204 (1961 Ed).

Appellant was sentenced to imprisonment for a period of one to three years on each count, the sentences to run concurrently.

Appellant filed and the District Court granted an application to appeal in *forma pauperis*, to this Court. This Court has jurisdiction under 28 U.S. Code 1291.

STATEMENT OF THE CASE

At about 10:00 p.m., October 13, 1965, (Tr. 19,85), the complaining witness Sloan drove to 1311 Florida Avenue, N.E. to pick up one Evelyn Thorp (Tr.9). This is the residence of the defendant Tyler and others (Tr. 85), but not of Mrs. Thorp.

Tyler, an acquaintance (Tr. 10) and a sometimes boy-friend of Mrs. Thorp (Tr. 21), approached Sloan. They argued about a television set Tyler had given to Mrs. Thorp and which Sloan had sold (Tr. 10). Sloan approached the residence (Tr. 11-12). Tyler and Sloan had arrived separately, both by automobile (Tr. 9, 89).

Sloan testified that Tyler pulled a pistol and fired a shot into the ground (Tr. 12). The bullet went near to, but did not touch Sloan (Tr. 12). Tyler waved his gun and fired a second shot. Sloan turned around. They walked a few steps. Tyler hit Sloan with the gun in the back of the head. They walked, stopped and trrned back (Tr. 12-13).

Sloan looked for any police officer coming. He saw one. Tyler didn't see the "scout car." Sloan stepped to the curb and beckoned. The 'wagon" pulled in. Tyler threatened Sloan. The police were approaching the curb. Someone hollered to Tyler to get rid of the gun (Tr. 13). Tyler put

the gun in a cap and gave the gun to a buddy who ran over and threw it in Tyler's automobile (Tr 14), parked perhaps 20 feet from the location of the argument (Tr. 15). (As will be seen later, Tyler denied this version.)

The entire incident took perhaps 15 to 20 minutes (Tr. 16).

Police arrived. Sloan described what Tyler "did with the gun, and that he tried to kill me." This was not in Tyler's presence (Tr. 17).

"Police shined the light in the car and picked the gun up." (Tr. 17).

Another officer took Tyler to the patrol wagon (Tr. 17).

Quite a few persons witnessed the argument, but not the shooting (Tr. 19). Some of Tyler's friends were gathering while Tyler struck Sloan (Tr. 37).

Two policemen testified, (one in the Government's case in chief (Tr. 47) and one on rebuttal (Tr. 109) that there was blood on Sloan's head and on his shirt. There was no testimony as to the amount or freshness of or any causal connection between the blood and the striking.

One policeman testified that Sloan had come alongside the patrol wagon, kept up with it and beckoned it, (Tr. 41),

then drew their attention and pointed out Tyler as the assailant (Tr. 40).

Tyler denied to police that he had a gun (Tr. 42-43). Sloan told police the gun was in the car (Tr. 44). The officer found the gun on the floor at the rear seat (Tr. 44). Tyler said the car was his (Tr. 44). In the gun were found five live rounds, one round was expended and one was missing (Tr. 45). There was a strong odor of burned powder, indicating a recent firing (Tr. 49).

Although Sloan testified police used a flashlight, one officer testified they had no flashlight (Tr. 51). There were no distinguishable marks on the brick pavement into which the gun was fired (Tr. 51).

The other officer said that when first seen, Tyler was leaving the right side of his automobile (Tr. 53). Sloan was 25 to 30 feet away. Fifteen other people had gathered (Tr. 54).

This second officer said he had a flashlight and searched for markings on the brick pavement but found nothing definite(Tr. 56). No blood was on the gun (Tr. 58).

It was stipulated that Tyler had no permit to carry a gun (Tr. 59-60).

Pertinent portions of the defense case follow:

Mrs. Henrietta Johnson is a resident of 1311 Florida Avenue, N. E. (Tr 65), the house in which Tyler resided, where Sloan went to fetch Mrs. Thorp, and in front of which the events occurred. She testified she was on her basement stairs when she heard an explosive sound. She immediately ran to the front door to get her children, and found Tyler and Sloan arguing "on the side of the (porch) steps." (Tr. 65). She was there until police arrived, but saw no gun (Tr. 66-67), saw no bleeding (Tr. 68). She did not get that close (Tr. 71), although Tyler and Sloan were within the distance from the witness stand to the prosecutor (Tr. 71). She did not see Tyler go to his car (Tr. 73) nor did she see Sloan signal police (Tr. 72). She did not see Tyler strike Sloan (Tr. 72). Police opened Tyler's car door (Tr. 76). The light was good (Tr. 80). It was at Sloan's suggestion that police went to Tyler's car. She stood on one side and the police on the other, and when she crossed sides the policeman had the gun in his hand (Tr. 68).

Tyler's employer testified Tyler has a reputation for peace and good order (Tr. 83).

Tyler testified:

He met Sloan in front of 1311 Florida Avenue, N. E., they argued about the TV set (Tr. 86) and continued arguing

until police arrived (Tr. 86). After police announced there was a pistol in Tyler's car, they arrested him (Tr. 86).

Tyler denied ever having a pistol, shooting a pistol, or hitting or engaging in a physical fight with Sloan (Tr. 87). Tyler did not see Sloan with a gun (Tr. 88), Tyler did hear a noise like a gun or a firecracker (Tr. 88). Tyler flagged the patrol wagon (Tr. 89). Tyler saw no blood (Tr. 92).

There was no testimony as to fingerprints on the gun, whether the car door was locked or unlocked, and whether the blood was of a nature that was due to a blow of a gun or when the blood started flowing.

No independent witnesses, other then Mrs. Johnson, were called to testify.

Under cross-examination, Sloan, without objection of the Government, testified he had a criminal record of convictions for carrying a prohibited weapon (a pistol) in 1955 and 1966 (Tr. 27). He testified he was convicted of assault with a dangerous weapon (a nail file) in 1956 and destroying a door in 1957 (Tr. 38). Under cross-examination and over the objection of his counsel, the prosecutor was permitted to bring out that Tyler had been convicted of unauthorized use of a vehicle in 1955 (Tr. 99).

Defense counsel asked for and was denied judgment of

acquittal both at the conclusion of the prosecutor's case and at the end of the presentation of evidence (Tr. 64, 111). He also asked for suppression of the pistol as evidence (Tr. 61-64) on the ground that there was an illegal search without a warrant. The defense also contended it was improper rebuttal to permit a second officer to testify now for the first time that he, like his partner who testified to it in the case in chief, saw blood on Sloan and that the blood was wet (Tr. 107-108), and to the use of Tyler's criminal record to affect credibility (Tr. 96).

In its closing argument, the prosecutor made comparative credibility an issue (Tr. 114, 115, 117, 118, 127, 128). There was specific mention by the prosecutor in his summary of Tyler's criminal record (Tr. 128).

Counsel for the defendant also argued credibility (Tr. 119, 120, 121, 124).

To show the prosecution's heavy reliance upon the issue of credibility, the following appears on Tr. 128 in the prosecutor's summation: "In effect, this case does resolve itself upon credibility, but not just credibility, ladies and gentlemen . . ." and again (Tr. 130); "I ask you to weigh the testimony, weigh the credibility, and in the light of all these facts you will find Mr. Sloan ... despite his record...

was telling the truth on the stand.'

In the judge's charge to the jury, he said: "Now, the most difficult thing that I see in this case for this jury to determine is the credibility of the various witnesses" (Tr.134).

Again the judge said: "Now, it was brought out in the course of this trial that Sloan, complaining witness, had a criminal record, and that the defendant, Tyler, had a criminal record." (Tr.137)

STATEMENT OF POINTS

I. The introduction into evidence of an 11-year-old conviction for unauthorized use of an automobile to impeach the credibility of a defendant accused of assault with a dangerous weapon and carrying a deadly weapon is an abuse of the discretion allowed a trial judge. With respect to Point I, appellant requests the Court to read the following pages of the reporter's transcript: 27, 38, 96, 99, 112, 115, 117, 118, 119, 120, 121, 124, 127, 128, 130, 134.

II. The search of a parked automobile without warrant and not incidental to an arrest where there is no urgency for the search, where the vehicle is under control of police and where the purpose of the search is to gather evidence prior to an arrest is illegal and the evidence seized as a result of that search is not introducible evidence. With respect to Point II, appellant requests the Court to read the following pages of the reporter's transcript: 44, 61, 62, 111.

III. Where on the Government's evidence, important but not essential details are omitted and reasonable men cannot convict lacking those details, a motion for a judgment of acquittal should be granted. With respect to Point III, appellant requests the Court to read the following pages of the reporter's transcript: 62, 111.

IV. Where the prosecuting witness in the case in chief is contradicted by two defense witnesses in the case in chief, the prosecutor should not be permitted to add strictly cumulative evidence on rebuttal. With respect to Point IV, appellant requests the Court to read the following pages of the reporter's transcript: 107, 108.

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE PROSECUTION TO INTRODUCE INTO EVIDENCE FOR IMPEACHMENT PURPOSES AN ELEVEN YEAR OLD CONVICTION THAT NEITHER EVIDENCED A PROPENSITY TO LIE OR TO COMMIT THE CRIME FOR WHICH THE DEFENDANT WAS BEING TRIED.

A. Appellant was arrested for and convicted of and carrying a dangerous weapon assault with a dangerous weapon/without a license. Appellant contends that the discretion permitted in the applicable statute 14 D. C. Code § 305 and as further defined in the case law does not go as far as to permit introduction of a distant past conviction for unauthorized use of a vehicle. 22 D.C. Code §2204 (1961)

B. Appellant contends that if the purpose of that testimony was to equate the credibility or lack of it of the defendant to the credibility of the complaining witness, whose criminal record had earlier been introduced into evidence, the testimony was improper to and destructive of the right of the defendant to a trial on the facts of the case.

II. THE TRIAL COURT ERRED IN PERMITTING INTRODUCTION INTO EVIDENCE THE WEAPON SEIZED FROM THE DEFENDANT'S PARKED CAR, SAID SEIZURE BEING WITHOUT A WARRANT, NOT INCIDENTAL TO BUT PRIOR TO AN ARREST, AND WHERE THE AUTOMOBILE WAS SUFFICIENTLY UNDER CONTROL OF POLICE THAT THERE WAS NO DANGER OF LOSS OF ANY EVIDENCE THAT MIGHT BE FOUND IN THE CAR.

A. The Court below did not explore or hold a hearing as to the material circumstances surrounding the search and seizure. Appellant contends that on the state

of the record, assuming the truth of the Government's case, there was sufficient unexplained difference among the testimonies of the complaining witnesses and between the police officers themselves, that the trial court could not have concluded the search was reasonable.

B. Appellant contends alternatively that assuming the truth of any of the prosecution versions as to the seizure of this evidence, it was without sufficient cause. Appellant contends the seizure of this evidence without a warrant was shown to be for the convenience of the police and violative of due process.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A JUDGMENT OF ACQUITTAL.

A. The prosecution's case was devoid of important details without which reasonable men could not convict, assuming the entire truth and all reasonable inferences therefrom in the prosecution's case. The appellant contends that the missing evidence was crucial to an adequate understanding of the case.

B. Appellant contends alternatively the introduction of the weapon as evidence was improper. It is the appellant's further contention that without the gun in evidence, no reasonable jury could convict.

IV. THE TRIAL COURT ERRED IN PERMITTING THE GOVERNMENT TO PRODUCE STRICTLY CUMULATIVE EVIDENCE ON REBUTTAL.

A. It is the appellant's contention that cumulative evidence on rebuttal gives the Government an unfair advantage, since the defendant can hardly call, at the last minute, its own rebuttal witnesses to offset the buttressing effect of the cumulative witnesses.

ARGUMENT

Introductory to the argument, but necessary to it, is the observation that the pervasive vagueness of essential aspects of the Government and of the defense case, hinder somewhat a clear argument in several areas.

There is vagueness particularly in these respects:

1. In a case where it is disputed whether a gun was discharged once, twice, or at all, there is no evidence presented to show whether a search was made to find the bullet or a presumably expended case that is missing.

2. Also there is no evidence of the presence or absence of fingerprints on the weapon, in a case where the prosecutor claimed and the defense denied that the defendant twice fired and then used the weapon as a club upon the complaining witness.

3. Also in a case where the judge decided that the search without a warrant of a parked car for a weapon is reasonable, he had no evidence before him as to:

a. whether the weapon was or was not in plain view,

b. whether the automobile was or was not locked,

c. whether the windows were up or down,

d. whether the policeman opened the door,

e. whether he entered the automobile,

f. whether, the search being at night, he used or needed to use a flashlight.

The judge permitted the defendant's criminal record into evidence but his reasoning was not presented. The defendant's objection concerned relevance. The Government was not asked, nor did it volunteer, as to how it believed the search for truth would be aided by presenting the fact of the criminal record to the jury. The date of the trial was March 17, 1966. The decision in Luck v. United States, 121 U.S.App.D.C., 151, 348 F.2d 763 (1965) was rendered May 21, 1965.

Yet in the Tyler trial, there was no testimony as to the defendant's age and circumstances at either the time the crime for which he was being tried was committed or his age and circumstances when the earlier offense was committed in 1955.

With the above instances presented of a difficult record, the argument of the appellant's counsel follows:

ARGUMENT

I

THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE PROSECUTION TO INTRODUCE INTO EVIDENCE FOR IMPEACHMENT PURPOSES AN ELEVEN YEAR OLD CONVICTION THAT NEITHER EVIDENCED A PROPENSITY TO LIE OR TO COMMIT THE CRIME FOR WHICH THE DEFENDANT WAS BEING TRIED.

The pertinent statute is 14 D.C. Code § 305 (1961)

This trial revolved around the credibility of the complaining witness and the defendant. Both prosecution and defense relied upon the credibility of their own witnesses and argued credibility to the jury. Testimony of the complaining witness as to the gravamen of the offense was unsupported by eyewitness testimony, although there was circumstantial evidence as to part of the offense. The testimony of the defendant and his eyewitness contradicted that of the complainant as to:

1. whether shots were fired and their number,

2. whether there was blood on the complaining witness,

3. whether Tyler had a gun and what happened to it,

4. whether Tyler struck Sloan and whether there was any violence,

5. who beckoned police.

As the prosecutor put it in closing argument: "Again I must say you must decide who is telling the truth."

Thus, it is clear that any factor, no matter how small, that affected Tyler's credibility, can be assumed to have made an impact on Tyler's rights. Nor was this case so strong, without the impeaching testimony, that the Court should be reluctant to set aside the judgment, (Covington v. United States, Slip Opinion #19717 (D.C.Cir Dec.1,1966).

A search of the transcript does not show the reason for or the relevance of the use of the criminal record.

During the Government's case, defense counsel, without objection from the prosecutor, probed the complainant's past and proved convictions for carrying a deadly weapon (a pistol) on two occasions, assault with a dangerous weapon on one occasion and destroying private property. The earliest offense was for the year 1955.

During the defense case, the prosecutor, over objection of the defense attorney that the testimony was not relevant, was allowed to elicit from the defendant that eleven years earlier he had been convicted of unauthorized use of an automobile. It is submitted that under Luck, supra, and the cases following this was manifestly improper.

In Luck (Tr. 157), this Court set forth some criteria that the trial court might consider in determining whether to permit convictions into evidence for impeachment purposes.

Applying those criteria to the facts of this case, we have: "The nature of the prior crimes." Tyler's offense, the unauthorized use of a vehicle, is an offense, the character of which is not necessarily indicative of Tyler's proclivity to lie or to assault. At the least, the judge should have probed to determine whether this was a joyriding escapade or more.

"The length of the criminal record." On this record, it was Tyler's only offense, and this surely not indicative of a pattern of lying or assault throughout his life.

"The age and circumstances of the defendant." On this record, all we are presented is that the offense occurred in 1955. The older cases, as exemplified by Murray v. United States, 53 App. D.C. 125 (1922) held, in discussing an 11 year old conviction. "The remoteness of the convictions affected only the weight to be given them as evidence, and it was for the jury, who would in connection therewith consider the relevant testimony including defendant's statement that since 1911, he had not been in any trouble." It is submitted that since Luck, the philosophy concerning such matters has

changed and the remoteness of the conviction can, as a matter of law, make it inadmissible. "And above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." Tyler decided to take the risk and took the witness stand, as was his right. He should not, of course, be penalized for exercising that right. This criterion as applied to one such as Tyler who elects to take the witness stand might be restated as "the extent to which the search for the truth is aided by the jury's knowing of a conviction," or perhaps, "does the fact of the conviction make the defendant's testimony less trustworthy."

Luck, supra, and John I. Brown v. United States, Slip Opinion #20,011 (D.C.Cir) mention the guidelines furnished by the Commissioners on Uniform State Laws Uniform Rule of Evidence 21: "Evidence of a conviction not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility."

This rule still would give the judge discretion to refuse evidence of a conviction involving dishonesty if the fact of the conviction does not impair credibility.

Unauthorized use of an automobile means just that. It is not the same as larceny. To permit impeachment by the use of such an offense standing alone is to render the guidelines laid down in Luck, supra, as virtually meaningless. To permit impeachment on the basis of a single instance of unauthorized use of a vehicle when the offense occurred eleven years earlier compounds the error, it is submitted. Of what aid could it possibly have been to the jury? It merely disgraced and demeaned the defendant. In the circumstances of this case, where the essential evidence of the assault was controverted, where it was the word of one man against the word of another, the criminal record may well have been the evidence that convicted the appellant. If the judge admits such evidence, he must surely explain to the jury what unauthorized use of an automobile entails and what it does not, so that the jury may consider whether it indicates a weakness toward perjury.

Luck, supra, also cites Rule 106 of the American Law Institute Model Code of Evidence, which provides in substance that there may be no impeachment of a criminal defendant by means of prior conviction, unless the accused himself has introduced evidence solely for the purpose of supporting his credibility. This Tyler did not do. He did, as was his right,

attack the credibility of the complaining witness by use of a criminal record. He did introduce character evidence, but only as to his reputation for peace and good order.

That trial counsel for the appellant did not ask for a limiting instruction may have been due to a reasonable belief that such an instruction could only aggravate the effect of the evidence on a jury. (United States v. Tramaglino, 197 F.2d. 928).

Consideration of the record by the jury to indicate propensity would have been improper, and the judge so instructed the jury, but what does this instruction avail the defendant if the evidence was irrelevant to either propensity or credibility. It was, it is submitted, a clumsy appeal to the emotions of any jurors who might have felt that convicted men comprise a caste not worthy of belief or of due process of law.

As this Court said in John I. Brown, supra: "While one who might recently have been convicted of perjury might well be suspected of lying again under oath, the fact that a defendant accused of assault has already been convicted of assault establishes a history of violent behavior, but proof of violent behavior is inadmissible to prove assault."

Substituting in the above passage the accusation and the

conviction in the Tyler case, it would read: "While one who has recently been convicted of perjury might well be suspected of lying under oath, the fact that a defendant accused of assault with a dangerous weapon was convicted of unauthorized use of a vehicle eleven years earlier has no such bearing upon credibility. The unauthorized use of a vehicle establishes a history of unauthorized use of a vehicle (joyriding), but proof of prior unauthorized use of a vehicle (joyriding) is inadmissible to prove assault with a dangerous weapon and carrying a dangerous weapon.

It is submitted that the trial judge must have misconstrued his role under Luck, supra, and John I. Brown, supra.

Since counsel did make timely objection to the introduction of the criminal record and since the Government's evidence was disputed, sketchy and unclear and not "so strong a case that it is unlikely that appellant could have suffered prejudice in any event." (Covington v. United States Slip Opinion #19717 (D.C.Cir, Dec. 1, 1966), the rationale and indeed the words of this Court compels the view that the prosecutor should not have been permitted to question Tyler about his ancient conviction.

The instant case is distinguishable from Harley v. United States, Slip Opinion #20,285 (D.C.Cir,April 13,1967),

where the Court was not requested to exercise discretion under Luck, supra. Tyler's attorney specifically objected in a timely fashion to the evidence, citing relevancy, the ground of Luck, supra, although he did not mention Luck, supra, by name.

The instant case is distinguishable from Young v. United States, Slip Opinion #20269 (D.C. Cir.April 14, 1967) where this Court stated, "The point was debated at some length in the trial court. Judge Matthews demonstrated knowledge of our decision and opinion in Luck v. United States. The criteria outlined in that case were discussed by counsel. Luck requires that the trial judge exercise a discretion on the point. Judge Matthews clearly did so."

In Tyler's trial, the point was not "debated", the trial judge did not"demonstrate knowledge" of the decision, the "criteria were" not "discussed by counsel," and whether the trial judge "clearly" ... "exercised a discretion" is debatable.

II.

THE TRIAL COURT ERRED IN PERMITTING INTRODUCTION INTO EVIDENCE THE WEAPON SEIZED FROM THE DEFENDANT'S PARKED CAR, SAID SEIZURE BEING WITHOUT A WARRANT, NOT INCIDENTAL TO BUT PRIOR TO AN ARREST, AND WHERE THE AUTOMOBILE WAS SUFFICIENTLY UNDER CONTROL OF POLICE THAT THERE WAS NO DANGER OF LOSS OF ANY EVIDENCE THAT MIGHT BE FOUND IN THE CAR.

The circumstances of how the police obtained the pistol that was introduced into evidence are not sufficiently clear. A hearing on a motion to suppress, preferably before trial, would have provided the necessary infomation. The record does not show that it was held.

It would appear from the evidence that, at the suggestion of the complaining witness, a friend of Tyler was given the weapon by Tyler and put it in Tyler's car, and that a policeman, guided by another friend of Tyler's, went to Tyler's car, opened the door, and using a flashlight found the gun on the floor. This is the likeliest explanation of unclear facts, because it is doubtful that at 10:00 p.m. on an October night, even assuming good streetlighting, the gun would be seen without a flashlight and without opening the car door. If the door had been open or if the gun had been in plain view, it could be expected that police would have so testified. They did not. Tyler did not consent to a search.

In Dorsey and Wright v. United States, 372 F.2d 929(1967) (decided January 19, 1967) this Court found reasonable a

police search with a flashlight of an automobile. The set of facts were not comparable.

In Dorsey and Wright, appellants were known to be associated with narcotics violations, the appellants were inside of and in control of the automobile and the officer, standing on the street, directed his flashlight into the car without opening the door. Another officer reached through the open door and seized the contraband.

In the case now in appeal, there would appear (although the evidence is not entirely clear) to have been an actual trespass. There was no police knowledge that the defendant was engaged in an activity such as narcotics peddling. There was no evidence that the contraband came into plain view at any time. There was no reason to believe that the car and its contents would vanish were there not an immediate search. The car was under control of the police.

This case is more analogous to Silverman v. United States 365 U.S. 505, 5L Ed 2d 734,81 S. Ct 679 than it is to Dorsey and Wright.

In the case here, it is very likely that police made an actual trespass in entering the car to search it. There is no evidence whatsoever that the gun was in plain view, as it was in Hiet v. United States, Slip Opinion #19747, D.C.Cir,

January 12, 1967. Rather the case is more akin to Preston v. United States, 376 U.S. 364 (1964); cf Price v. United States, 121 U.S.App.D.C. 62, 348 F.2d 68.

Nor can the Government obtain solace from Harris v. United States, Slip Opinion #19,256 (D.C.Cir. Dec. 6, 1966), on Rehearing en Banc, Certiorari Granted April 17, 1967, now awaiting argument in the United States Supreme Court. There, the car had been impounded and the incriminating evidence was found in the course of a lawful purpose, i.e. rolling up the window to protect the interior of the car against the rain.

In any event, the Government can hardly claim that the gun was in open view at any time. If it had been, it can be assumed that police would have so stated. Compare Caldwell v. United States, 338 F.2d 385,386 (8th Cir. 1964).

Moreover, the defendant was not under arrest and it cannot be claimed that the search was incident to a lawful arrest or that to procure a warrant would have been impracticable. United States v. Ventresca, 380 U.S. 102 (106-107), also see Preston v. United States, supra.

In the case here on appeal, the automobile was not the instrument of the alleged crime, and even if it had been, the comment of Carroll v. United States, 267US 132 (1925) that in cases where the securing of a warrant is reasonably practical, it must be obtained would apply.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A JUDGMENT OF ACQUITTAL.

Without the pistol (Government Exhibit No. 1.) and the ammunition (Government Exhibit No. 2.) and the testimony of the police officer that the gun was found in the appellant's car, the convicting evidence would have been only the testimony of the complaining witness and the testimony of the police that they saw blood on his head and shirt.

The word of the complaining witness weighed against that of the defendant, the sole eyewitness to any of the incident, and the character testimony, would not have, it is submitted, been enough to sustain a conviction.

As to the blood, the record is devoid of evidence connecting the blood to the blows struck. At no time did any witness testify that the blood was caused by the blows. This is a fatal omission; the case should not have been allowed to go to the jury.

This Court has considered the problems as to the substantiality of the evidence and of motions for a verdict of acquittal (Federal Rules of Criminal Procedure, Rule 29(a) on numerous occasions. Appellant contends that under the doctrine of Curley v. United States, 18 U.S.App.D.C. 389, 160 F.2d 229 and the cases following it, motion for a judgment of

acquittal should have been granted. Reasonable jurymen must necessarily have had a reasonable doubt as to the guilt of carrying a weapon and using it in an assault as well. See Watts v. Indiana, 338U.S.49, 69 S.Ct 1347, 93 L Ed 1901 (1949).

Appellant urges that especially if the weapon is improper evidence, both motions for judgment of acquittal should have been granted.

IV.

THE TRIAL COURT ERRED IN PERMITTING THE GOVERNMENT TO PRODUCE STRICTLY CUMULATIVE EVIDENCE ON REBUTTAL.

When Officer Franklin was put on the stand for rebuttal, his testimony was solely for the purpose of adding a witness to the complaining witness and a fellow officer that there was blood on the complaining witness. The defendant and an eyewitness had denied seeing the blood.

The trial judge stated the reason was that he suspected the Government was caught by surprise at the defense testimony.

The rebuttal witness had testified in the case in chief and could have then testified as to the blood.

Rebuttal is for the bringing in of new evidence to contravene the defense evidence, not for an accumulation of evidence or to make, as here, the Government witnesses outnumber the defense witnesses. The prejudice is that the defense had completed its case and might well have brought in no more witnesses because they were thought to be unnecessarily cumulative. That is, of course, supposition.

While this Court has held that the trial judge has discretion to allow rebuttal evidence which should have been offered in the case in chief (United States v. Schneider,

21 DC 381), and while the evidence here did bear on the subject matter of the defense, United States v. Gardiner, 2 Hayw. & HCC 89, Fed Cas. No 15, 1860, it has never ruled that mere cumulative evidence, where there is a likelihood of prejudice, is appropriate for rebuttal. (For a discussion of cumulative evidence in general, see Levin v. United States, 119 US App D.C. 156.)

CONCLUSION

For all the foregoing reasons, appellant prays that this Court reverse his convictions for assault with a dangerous weapon and carrying a dangerous weapon and remand the cases to the trial court with directions to enter judgments of acquittal on each count. Alternatively, appellant prays that the cases be remanded for a new trial, or appropriate proceedings, to enable the charges against him to be resolved fairly and in accordance with a proper application of the law.

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(Appointed by the Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,425

JAMES L. TYLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
NICHOLAS S. NUNZIO,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

Cr. No. 1328-65

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

(1) Did the trial court abuse its discretion in permitting appellant's testimony to be impeached by a single dissimilar prior conviction, where appellant inadequately invoked the court's discretion, and appellant's counsel impeached the complaining witness with a series of prior similar offenses and then went on to make improper arguments upon them?

(2) Did the trial court err in admitting the pistol used to perpetrate the offenses which was seized from appellant's car at the time of his arrest a few steps away?

(3) May appellant attack the trial court's refusal to grant his motions for judgment of acquittal which amounted to no more than a quarrel with credibility?

(4) Did the trial court abuse its discretion in permitting rebuttal designed to destroy a false claim of inconsistency between the Government's witnesses?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,425

JAMES L. TYLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was tried to a jury before Judge Howard F. Corcoran on March 17 and 18, 1966 and found guilty as charged of assault with a dangerous weapon and carrying a pistol without a license (22 D.C. Code §§ 502 and 3204). He was sentenced to imprisonment for one to three years on each count, the sentences to run concurrently. This appeal without prepayment of costs followed.

At trial the complaining witness for the Government was Charles F. Sloan, a barber, aged thirty-three. Mr. Sloan testified that at about 10 o'clock in the

evening of October 13, 1965 he had driven to 1311 Florida Avenue, N.E. to pick up his girlfriend Evelyn Thorp.[1] As usual, he blew the horn for her, but instead of her the appellant came running out of the house and over to Mr. Sloan's car. (Tr. 9-11.) Mr. Sloan stated that appellant asked him for the return of a television set which appellant had given to Evelyn Thorp sometime before and which Mr. Sloan had sold to pay their rent.[2] Mr. Sloan told appellant that he no longer had the set, and then started up the steps to the house. (Tr. 10-12.) He testified that at this point appellant said the woman was not at the address, pulled a pistol and fired one shot at the ground a few inches from Mr. Sloan's feet (Tr. 12, 33). When Mr. Sloan turned to face him, appellant fired a second shot and said: "You don't think I will kill you, do you?" Appellant then announced he was taking Mr. Sloan to the Ninth Precinct and started to march him off at gunpoint. (Tr. 12.) After a couple of steps, Mr. Sloan stated, appellant hit him in the back of the head with the muzzle end of the gun and told him that the "next one will go through you" (Tr. 12, 19, 33). The march continued around the corner of 13th Street and Florida Avenue, and on up the street. Mr. Sloan testified that appellant then stopped him again, informed him that he had changed his mind about the precinct and was instead "going to kill [him] tonight," and ordered him to march back to where they had come from. (Tr. 13.) Although no others had been present when the shots were fired, by this time a small crowd had gathered consisting apparently of appellant's friends (Tr. 19, 30). Mr. Sloan then saw a police wagon turn the corner behind appellant, and he stepped to the curb and put out his hand to signal it. One of appellant's

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[1] Mr. Sloan indicated that he had been living with Evelyn Thorp since 1964 at his address at 2845 Maryland Avenue, N.E., although she was in Boston at the time of the trial (Tr. 9, 20-21).

[2] Mr. Sloan stated that he had earlier attempted to return the set, but appellant had refused it saying it was a gift to Evelyn Thorp (Tr. 20).

friends hollered, "James, you better get rid of that gun, man. There's the police." (Tr. 13, 35.) Appellant then removed his cap, placed the gun in it, and gave it to a boy who threw it into appellant's car and who continued running (Tr. 14, 24-25, 35). At this point about 15 or 20 minutes had elapsed from the start of the argument (Tr. 16). The police had to wait for a number of cars to pass but finally pulled in to the curb (Tr. 13, 22-23, 34-35). Mr. Sloan, who was bleeding from the head, told them where the pistol was, and an officer shined a light in the car and recovered the pistol (Tr. 16-18). At trial Mr. Sloan identified as very similar in appearance to the one used on him the pistol admitted in evidence (Tr. 18). Mr. Sloan's testimony was impeached with four prior convictions,[1] the circumstances of which he explained to the jury (Tr. 26-29, 35-36, 38-39).

Private Robert A. Cornish, Ninth Precinct, then testified that he was on duty driving a patrol wagon on the night in question. He saw Mr. Sloan beckoning to him with a crowd of people on the sidewalk in front of 1311 Florida Avenue (Tr. 41). When the traffic cleared the officer pulled to the curb next to Mr. Sloan, who reported he had been shot at, pointed out appellant, and indicated where the gun was (Tr. 41-42, 44, 50). The officer found the gun on the right rear floor of appellant's car which was parked directly alongside the house (Tr. 44, 48-49). It contained five live rounds and one expended cartridge, and had one round missing (Tr. 45-46). The pistol had a strong odor of burned powder as if it had recently been fired (Tr. 49). The officer stated that Mr. Sloan was bleeding from a head wound and had blood on his shirt (Tr. 47).

The Government's final witness was Private Harry R. Franklin, Jr. of the Ninth Precinct. Officer Franklin testified that he first saw appellant as appellant was leaving the right side of appellant's car which was

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[1] These were: carrying a pistol without a license, 1955; simple assault, 1956; simple assault and destroying property, 1957.

parked in a lot next to the 1311 Florida Avenue address (Tr. 53, 56). After speaking with Mr. Sloan who was standing a few feet away, the officer placed appellant under arrest (Tr. 54). Officer Franklin removed the ammunition from the pistol found by the other officer and searched without success for a bullet mark on the steps or pavement with his flashlight (Tr. 55-56). At the conclusion of this testimony, the defense stipulated that appellant had had no license to carry a pistol on the date in question (Tr. 59-61). When the pistol and ammunition were then moved into evidence, defense counsel for the first time objected and argued that the police had no probable cause to enter the car and should have obtained a search warrant. The court overruled the objection and admitted the evidence. (Tr. 61-62). After a defense motion for judgment of acquittal on the ground of insufficient evidence, which was denied, the Government rested (Tr. 62).

The defense presented an opening statement at this time, and then Henrietta Johnson of 1311 Florida Avenue took the stand. This witness said she was coming up from her basement when she heard what sounded like a shot. She and a girl living with her ran to the door and saw appellant and Mr. Sloan arguing about a television set. This lasted about four or five minutes before a patrol wagon arrived. (Tr. 65-68.) A policeman was directed by Mr. Sloan to appellant's car and apparently retrieved a gun from it (Tr. 68, 75-79). This witness claimed she never saw any blood on Mr. Sloan and she never heard anyone call out that police were coming (Tr. 68-69, 71-73, 79). On cross-examination, she said there was only one shot-like sound, but she never saw a gun in the hand of appellant or Mr. Sloan (Tr. 69, 71, 74, 80). Nor did she see appellant near his car, and he was about twenty-five feet from it when the police arrived (Tr. 70, 73).

Joseph Tutton of Tutton's Carpet Service was next to testify. He stated that appellant had worked for him

for five years, and appellant's reputation for peace and good order was very good (Tr. 83).

Appellant then took the stand in his own defense. He stated that he approached Mr. Sloan about the television to pay him for it or to give him the money to finish making the payments on it (Tr. 85-86). Appellant had no gun and did not see that Mr. Sloan had one, although he did hear what sounded like a gun-shot or firecracker (Tr. 87-88). Appellant never hit Mr. Sloan (Tr. 87). But the argument continued until appellant himself flagged down a patrol wagon. Someone told the policemen there was a gun in appellant's car, from which they then recovered it. (Tr. 86, 89.) On cross-examination, appellant stated that his car had been parked beside the house about 15 or 20 minutes before Mr. Sloan arrived, and he had not seen Mr. Sloan anywhere near his car (Tr. 90-91, 94). Although there was light in the area and he got within two feet of the complainant, he saw no blood on Mr. Sloan (Tr. 92-93, 96).[1] When the police arrived, appellant claimed, he was a good distance from his car (Tr. 94-95).

Mid-way through the cross-examination of appellant, the defense attorney for the first time requested the court not to allow the use of appellant's criminal record for impeachment. The ground stated was that a conviction for unauthorized use of a vehicle would not be relevant to a charge of assault with a gun (Tr. 96-97). The court ruled that the impeachment would be permitted, and appellant was thereafter impeached with such a conviction in 1955 which he admitted (Tr. 97, 99).

The defense attorney recalled Mr. Sloan to ask him if he had ever suggested to the defense attorney in the

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[1] In the course of the prosecutor's examination of appellant on this subject, the defense attorney stated an objection before the jury to the prosecutor's plural reference to "police officers" as testifying about Mr. Sloan's condition. Thereupon the prosecutor withdrew the question. (Tr. 92.) The second officer, Private Franklin, was thereafter recalled in rebuttal to testify that he also saw wet blood on Mr. Sloan (Tr. 107-109).

halls of the Court of General Sessions that they should "go downstairs and just forget about this whole matter." This Mr. Sloan denied. (Tr. 104-105.)

Officer Franklin was recalled in rebuttal on behalf of the Government. When the prosecutor sought to question him concerning Mr. Sloan's physical condition when the police arrived, the defense attorney objected that this was not within the scope of rebuttal testimony. The court ruled that appellant's emphasis on the absence of blood on Mr. Sloan would permit such rebuttal where it might have been cumulative otherwise. The officer then went on to testify that Mr. Sloan had wet blood on his head and shirt. (Tr. 107-109.)

A renewed motion for judgment of acquittal claiming erroneous admission of the pistol in evidence and prejudicial rebuttal testimony was denied (Tr. 111-112). In closing argument the prosecutor reviewed the evidence adduced and asked the jury to weigh the relative credibility of the witnesses in view of the evidence (Tr. 112-118). The defense counsel attacked the credibility of the Government's primary witness, arguing that the complainant was a criminal and a man of violence (Tr. 120-121, 124). He argued further that Mr. Sloan had planted the pistol in appellant's car, and that the officers' testimony should be disbelieved because they could be regarded as committed to Mr. Sloan's story (Tr. 119-120, 123, 124). In rebuttal the prosecutor asked that the complainant not be denied protection of the laws merely because he had a criminal record, and he pointed out that appellant had a criminal record too which went to his credibility (Tr. 127-128).

The court fully charged the jury. He advised the jury that the directly conflicting stories put credibility strongly in issue. He then explained how the credibility of witnesses should be examined and weighed, and instructed the jury that a record of prior convictions could be considered only in determining whether to believe the witnesses. (Tr. 134-137.)

STATUTES INVOLVED

Title 14, District of Columbia Code, Section 305 provides:

> No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters. In order to prove such conviction of crime it shall not be necessary to produce the whole record of the proceedings containing such conviction, but the certificate, under seal, of the clerk of the court wherein such proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient.

Title 22, District of Columbia Code, Section 502 provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 3204 provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he

shall be sentenced to imprisonment for not more than ten years.

SUMMARY OF ARGUMENT

I

Appellant in this assault and weapons case urges that his impeachment with a single prior conviction for unauthorized use of a motor vehicle is reversible error. But he inadequately invoked the trial court's discretion on the question of its admission. And further, he impeached the complaining witness with a series of prior similar offenses and went on to urge upon the jury that the complainant must have possessed the pistol in view of his propensity to commit the crimes. In these circumstances, appellant's complaint must fail.

II

Appellant claims that the police were required to obtain a search warrant prior to seizing the pistol used to perpetrate the offenses from appellant's car at the time of his arrest only a few steps away. But the search was incident to a lawful arrest and eminently reasonable.

III

Appellant's attack on the court's refusal to grant his motions for judgment of acquittal is but a quarrel with credibility and thus patently frivolous.

IV

There was no abuse of discretion by the court in permitting rebuttal. This testimony was appropriate to destroy appellant's false claim of inconsistency between the Government's witnesses.

ARGUMENT

I. The trial court did not abuse its discretion in permitting appellant's impeachment by a single prior conviction.

(Tr. 25-29, 35-36, 38-39, 96-97, 99, 120-125, 127-128, 136-137)

Appellant's complaint that the trial court abused its discretion in permitting his impeachment by a single prior conviction[5] is wholly without merit, particularly in view of the circumstances of this case.

This is not a case where the defendant was prevented from taking the stand for fear of the effect of possible impeachment[6] or, having taken the stand, found himself smothered in prior convictions for similar offenses.[7] Here appellant was already under cross-examination by the prosecutor before any suggestion of a *Luck*[8] hearing was made.[9] The conviction used to impeach appellant in this assault and weapons case was one for unauthorized use of a motor vehicle.[10] And this conviction was intro-

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[5] Appellant's Br. 17-24.

[6] Compare *(John) Brown* v. *United States*, —— U.S. App. D.C. ——, 370 F.2d 242 (1966).

[7] Compare *Stevens* v. *United States*, —— U.S. App. D.C. ——, 370 F.2d 485 (1966) (dissenting opinion).

[8] *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

[9] This fact, of course, limited the pertinent inquiry to whether the introduction of the impeachment would cast appellant in such a light as to prejudice the jury against him. The answer to that question was sufficiently clear at this point in the case that the judge could move upon it with dispatch. Moreover, defense counsel failed to articulate effective reasons for invoking the court's discretion in appellant's favor. See Tr. 96-97. Compare *Hood & Jackson* v. *United States*, —— U.S. App. D.C. ——, 365 F.2d 949, 951 (1966).

[10] Such a conviction carries a perceptible element of dishonesty and thus obviously relates to testimonial trustworthiness. Its lack of relevance to a propensity to commit the crimes charged, of course, should be a point in favor of and not against its admission. Compare the arguments of appellant, Br. 17 and Tr. 96-97.

duced only after appellant had testified in direct contradiction of the Government witnesses,[11] and after the complaining witness had been witheringly impeached by an uninhibited recitation of *his* prior assault, weapons and other convictions.[12] Further, any prejudice[13] to appellant was more than neutralized by subsequent arguments[14] and instructions.[15]

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[11] See generally, the Counterstatement herein; also, Appellant's Br. 17.

[12] Apparently without having checked against court records to account for the different charges upon arrest and upon conviction, defense counsel clumsily sought to impeach the complaining witness on the basis of felony charges which ended up as misdemeanor convictions. Although the witness corrected counsel and subsequently explained these convictions to the jury (Tr. 26-29, 35-36, 38-39), it is difficult to discount the impact of these prior similar felony arrests, particularly in view of the subsequent arguments made by defense counsel. See *infra*, footnote 14.

[13] Of course, credibility was the central issue in this case. But to the extent that the impeachment of appellant by his prior conviction damaged his credibility, this may not in our view be regarded as prejudice. Such an impeaching effect of this evidence is wholly proper and legitimate, and may not be complained of by this appellant. See 14 D.C. Code § 305; *Brooke* v. *United States*, D.C. Cir. No. 20241, decided April 19, 1967, slip op. 12.

[14] In connection with defense counsel's suggestion and argument that it was the complaining witness rather than appellant who had the pistol, used it, and planted it in appellant's car, his use of the complainant's convictions assumes some significance. See Tr. 25-26, 120-125. In particular, defense counsel urged upon the jury that

> "It would appear from that record that [Mr. Sloan, the complaining witness,] is a man of violence, that he has been involved in violence on several occasions, and that he is somewhat of a violent man based solely on that record. And I would ask you to take that into consideration when you make some determination as to who in fact possessed this gun." (Tr. 120-121.)
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> * * * *
>
> "Now, I say that Sloan is not a believable person. He is a criminal. He is a criminal. He is not a believable witness." (Tr. 124.)

[15] Both court and prosecutor advised the jury that prior convictions related only to credibility (Tr. 127-128, 136-137). Certainly, the jury's return of a conviction in this case despite the defense

Under such circumstances, appellant may not claim a privilege to inflate his relative credibility by presenting his own testimony in lily-pure aspect before the jury. See *Brooke* v. *United States*, D.C. Cir. No. 20241, decided April 19, 1967, slip op. 11-13.

II. The trial court properly admitted the pistol seized incident to the arrest.

(Tr. 17-19, 30-32, 42-45, 48-49, 53-54, 56, 61-62, 68, 73, 75-79, 89, 94-95, 97-98)

Without making any pretrial motion and only after all Government testimony concerning the pistol had been received, appellant at the close of the Government's case first moved to suppress the pistol (Tr. 61-62). Appellant then urged that the police ought to have obtained a search warrant, although any search or seizure shown by the evidence was obviously contemporaneous in time and place with the arrest. This contention, repeated here,[16] cannot prevail.[17]

The police action undertaken here was fully justified as incidental to a lawful arrest.[18]

> "Unquestionably when a person is lawfully arrested,[19] the police have the right, without a

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tactics discussed is a convincing demonstration of the aptness of the Supreme Court's recent affirmation of the reliance our jurisprudence places upon the responsibility and intelligence of the jury. See *Spencer* v. *Texas*, 385 U.S. 554 (1967).

[16] Appellant's Br. 25-27.

[17] Appellant's motion, in the first place, came far too late. *E.g.*, *Segurola* v. *United States*, 275 U.S. 106, 110-112 (1927).

[18] Although he strikes on the periphery of the question, appellant neither at trial nor here has attacked the adequacy of the probable cause basis of his arrest. We believe no such challenge could be made in any event, given the complainant's statements to the police officers on the scene and the corroboration of those statements inherent in the circumstances. See *(Melvin) Brown* v. *United States*, —— U.S. App. D.C. ——, 365 F.2d 976, 978-979 (1966).

[19] Appellant at one point asserts that he was not actually under arrest at the time of the search of his car. Br. 27. This point

search warrant, to make a contemporaneous search[20] of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Weeks* v. *United States*, 232 U.S. 383, 392 (1914); *Agnello* v. *United States*, 269 U.S. 20, 30 (1925). This right to search and seize without

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was not explored at trial, doubtless because of the generality and untimeliness of the defense objection. Nevertheless, Government testimony indicated that the two officers on arrival at the scene first spoke to the complainant; both then spoke to appellant and Officer Franklin arrested him; and only then, it appears, did Officer Cornish go to the car for the pistol (Tr. 17-18, 42-45, 54). This testimony is not precisely definitive of the time sequence, but the Government has the benefit of available inferences here. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Even according to appellant's own testimony, while Officer Cornish recovered the weapon and confronted him with it, Officer Franklin remained with appellant (Tr. 89). This evidence, while not compelling the conclusion that appellant was under arrest when the gun was sought, compare *(Melvin) Brown* v. *United States*, *supra* at 979, rather strongly suggests it. See *Kelley* v. *United States*, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961).

In any event, where there is probable cause both to arrest and search, even though no arrest has actually been executed, a search without a warrant will not be held invalid for that reason alone. See *Warden* v. *Hayden*, 35 U.S.L. WEEK 4493, 4494 (U.S. May 29, 1967); compare *Johnson* v. *United States*, 333 U.S. 10, 16-17 (1948), where the former condition did not exist. Particularly in the case of motor vehicles, searches without a warrant on probable cause have long been upheld, and it is held with good reason that the arrest need not precede the search. *Husty* v. *United States*, 282 U.S. 694, 700 (1931); *Carroll* v. *United States*, 267 U.S. 132, 138 (1925). Moreover, in circumstances such as those here, no interest is served by forcing the police to impose a justifiable restraint upon a person as a condition to making a search which, if fruitless, might cause them to decide against it. On the other hand, if the search leads the police to make an arrest for which probable cause previously existed, the search would nevertheless seem "incident to arrest" and eminently reasonable. *Gorman* v. *United States*, 355 F.2d 151, 159-160 (2nd Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966) (Friendly, J.); and see *United States* v. *Rabinowitz*, 339 U.S. 56, 60 (1950).

[20] Needless to add, appellant's reliance on the holding in *Preston* v. *United States*, *infra*, is inappropriate. Appellant has simply ignored the distinguishing factor here of contemporaneousness of the search with the arrest. See *Price* v. *United States*, 121 U.S. App. D.C. 62, 348 F.2d 68, *cert. denied*, 382 U.S. 888 (1965); *Adams* v. *United States*, 118 U.S. App. D.C. 364, 336 F.2d 752 (1964), *cert. denied*, 379 U.S. 977 (1965).

> a search warrant extends to things under the accused's immediate control, *Carroll* v. *United States*, *supra*, 267 U.S., at 158, and, to an extent depending on the circumstances of the case, to the place where he is arrested, *Agnello* v. *United States*, *supra*, 269 U.S., at 30; *Marron* v. *United States*, 275 U.S. 192, 199 (1927); *United States* v. *Rabinowitz*, 339 U.S. 56, 61-62 (1950)."

Preston v. *United States*, 376 U.S. 364, 367 (1964). Here the police arrived on the scene of the shooting and immediately learned what appellant was accused of doing and where to look for the missing pistol (Tr. 17-18, 42-45, 54). One officer testified that when he first saw appellant the latter was just walking away from the car (Tr. 53, 56). Even appellant's witness stated that when the police arrived appellant was only twenty-five feet from the car, while appellant put it as a "good distance" (Tr. 73, 94-95). See *United States* v. *Francolino*, 367 F.2d 1013 (2nd Cir. 1966), *cert. denied*, 386 U.S. 960 (1967). Further, there was a crowd of apparently uncooperative bystanders including friends of appellant milling about who undoubtedly saw where the loaded weapon had been secreted, any one of whom could have removed it at will (Tr. 19, 30-32, 97-98). See *Smith & Anderson* v. *United States*, 118 U.S. App. D.C. 235, 238, 335 F.2d 270, 273 (1964).[21] Certainly, the law does not require officers in such circumstances to ignore the public protection and their own safety and to spend perhaps several hours in attempting to preserve the scene and obtain a search warrant. See *Warden* v. *Hayden*, *supra* at 4494; *cf. Preston* v. *United States*, *supra* at 367.

The officers' action here was well within the Fourth Amendment's safeguards.[22]

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[21] Appellant's claim at Br. 26 that his car was under police control or in custody so as to preclude a search thereof seems without merit in law or fact, in view of the circumstances earlier related.

[22] Although for reasons previously noted, see footnote 19, *supra*, the record is undeveloped, it appears that the "plain view" doctrine

III. The trial court properly denied the motions for judgment of acquittal.

(Tr. 62, 111-112)

Appellant in claiming error[25] for the court's refusal to grant his motions for judgment of acquittal[24] points to no particular element of the crimes charged that was missing. Rather, he contents himself with the assertion that if the pistol and ammunition[27] and the police testimony[26] about them were suppressed, the testimony of the complainant[27] weighed against that for appellant would not have been sufficient to sustain a conviction.[28] This claim is frivolous on its face. See *Crawford* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332

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might provide further justification for the seizure here. See, *e.g.*, *Hiet* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 911 (1967). Support for this proposition appears in the testimony that a boy "threw" the pistol into the car (Tr. 14, 24-25), and that the officer, who went to the left side of the car, apparently spotted the pistol lying on the right rear floor with or without the aid of a flashlight (Tr. 17, 44, 48-49, 68, 75-79). It is, however, unclear whether he opened the car door to retrieve the weapon before or after seeing it.

[23] Appellant's Br. 28-29.

[24] Tr. 62, 111-112. Of course, appellant is no longer free to challenge the evidence as it stood at the end of the Government's case-in-chief. See, *e.g.*, *United States* v. *Calderon*, 348 U.S. 160 (1954); *Battle* v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953).

[25] See Argument II, *supra*.

[26] Having failed to object to this evidence, appellant is not now in a position to challenge it. *E.g.*, *Segurola* v. *United States*, 275 U.S. 106, 110-112 (1927).

[27] Beyond any doubt, as appellant seems to concede, the complainant's testimony amounted to prima facie proof of every element, except the lack of a license, of the two crimes charged. See Counterstatement at 1-3.

[28] This is nothing more than a question of credibility obviously for the jury. *Trimble* v. *United States*, —— U.S. App. D.C. ——, 369 F. 2d 950 (1966); *Young* v. *United States*, 114 U.S. App. D.C. 42, 43, 309 F.2d 662, 663 (1962); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956).

(1967; *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

IV. The trial court did not abuse its discretion in admitting rebuttal testimony.

(Tr. 16, 47, 68, 71-73, 92-93, 96, 107-111, 122-123)

Appellant finally complains[29] that it was error for the trial court to permit on rebuttal the testimony of Officer Franklin that he saw blood on the complainant's head and shirt at the scene of the attack.

Of course, admission of evidence in rebuttal is a matter within the scope of the trial court's discretion, even though it may be cumulative and it could have been offered in the case-in-chief. *United States* v. *Schneider*, 21 D.C. 381, 412-414 (1893).[30] The rebuttal here was presented in a wholly appropriate step to destroy the false inference appellant had raised and seized upon in an attempt to show inconsistency in the Government's testimony (Tr. 107-109).[31] Opportunity to reply was not denied appellant.[32] There was no abuse.

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[29] Appellant's Br. 30-31.

[30] *Accord*, *Rodella* v. *United States*, 286 F.2d 306 (9th Cir. 1960), *cert. denied*, 365 U.S. 889 (1961); and see *Powell* v. *United States*, 113 U.S. App. D.C. 396, 307 F.2d 396 (1962), *cert. denied*, 377 U.S. 972 (1964); *Morgan* v. *United States*, 111 U.S. App. D.C. 127, 294 F.2d 911 (1961), *cert. denied*, 368 U.S. 978 (1963).

[31] Appellant's argument in his brief at 30 that the rebuttal was merely cumulative misses the point. Two Government witnesses including the complainant testified that the latter was bloody (Tr. 16, 47). The third witness, Private Franklin, was not questioned on the subject on direct or cross. Then appellant and his witness, in a surprise move, claimed they saw no blood (Tr. 68, 71-73, 92-93, 96). And the defense attorney articulated before the jury his objection to the prosecutor's reference in cross-examination of appellant to the plural "police officers" testifying about blood (Tr. 92). See Counterstatement, footnote 4.

[32] Counsel for appellant cross-examined the officer on his rebuttal testimony (Tr. 110-111), and in closing spoke to the question of the blood (Tr. 122-123). No surrebuttal was requested.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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